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No.

In the

Supreme Court of the United States

DEBORAH RICE-LAMAR,

Petitioner,

versus

CITY OF FORT LAUDERDALE, a municipality, and GEORGE HANBURY, PETE WITSCHEN, BRUCE LARKIN, and JOHN PANOCH, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

I. Should this Court grant certiorari, vacate and remand, in light of a conflict with *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), a case in which the court of appeal held that a managerial employee with equal opportunity/affirmative action responsibilities' claim for Retaliation under the First Amendment was not barred, where his protected speech pertained to an issue of great public importance?

II. Does an affirmative action officer, whose official duties include evaluating and reporting on a governmental entity's discriminatory practices, have the right to reasonably confront her employer and disclose her findings of continued discriminatory practices under Title VII and § 28 U.S.C. 1983?

III. Do the important public policy concerns in reporting and challenging legitimate allegations of discriminatory practices of a governmental entity mandate that affirmative action officers be protected from adverse employment actions so that governmental entities cannot require affirmative action officers to issue false and misleading reports rather than to face termination?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 232 F.3d 836 (11th Cir. 2000) and is reproduced in the Appendix hereto (App. A at 1a). The opinion of the United States District Court for the Southern District of Florida is reported at 54 F.Supp.2d 1137 (S.D. Fla.1998) and is reproduced in the Appendix hereto (App. B at 18a).

STATEMENT OF JURISDICTION

The Decision of the United States Court of Appeals for the Eleventh Circuit was rendered on November 8, 2000. The court of appeals denied rehearing and rehearing en banc on January 12, 2001. The Supreme Court of the United States granted an extension of time until May 16, 2001 to file this Petition. This Petition for Writ of Certiorari has been timely filed prior to that date.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law. . .abridging the freedom of speech.

United States Constitution, Amendment XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1981:

(a) Statement of equal rights - All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined - For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment - The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Civil Rights Act – 42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Section 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or

deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The Plaintiff, Deborah Rice-Lamar ("Lamar"), brought this action against her former employer, the City of Fort Lauderdale ("City"), and George Hanbury ("Hanbury"), Pete Witschen ("Witschen"), Bruce Larkin ("Larkin"), and John Panoch ("Panoch") pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq.; the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985; and the First and Fourteenth Amendment to the United States Constitution.

I. Facts.

The City of Ft. Lauderdale entered into Consent Decrees with the Department of Justice for past discriminatory practices in the hiring and promotion of minorities and women in the Police and Fire Departments. In an attempt to mend its ways, the City Commission authorized an increase in the budget for the hiring of a professional to monitor and report on the City's Equal Employment Opportunity ("EEO") and Affirmative Action ("AA") goals. In 1988, after conducting a national search, Deborah Rice-Lamar was named as the City's Affirmative Action Specialist.

Lamar, an African-American female, was employed by the City as its Affirmative Action Specialist from June 20, 1988 through October 21, 1996. Pursuant to Lamar's written job description, she was responsible for reporting EEO/AA liabilities to the City's management, developing the City's Affirmative Action plan, as well as for planning, directing and implementing internal Equal Employment Opportunity and Affirmative Action programs for the City. All of her formal job evaluations were outstanding. The City never disciplined Lamar for her job performance until after 1994, when she began to openly question the City's hiring practices.

Pursuant to the City Commission's request, Lamar prepared annual Affirmative Action Reports outlining the City's progress and shortcomings in meeting its stated Affirmative Action Goals. In 1995, Lamar drafted the annual Affirmative Action Report. The Report was critical of the City's affirmative action efforts, and proposed that the City take a new direction in addressing the important issues of hiring and promoting minorities and women. Lamar was told by her superiors to delete the narrative and only publish the statistics. Although Lamar stated that doing so would render the report meaningless, she nevertheless complied with her superiors' directives and altered the report.

In February 1996, the City was in turmoil when a disgruntled African-American former City employee, Clifton McCree, shot five co-workers and then committed suicide. McCree stated in his suicide note that his actions were caused by the unfair treatment and racism that he experienced at the hands of the City.

Lamar voiced her concerns that the City's employment practices led to this tragic murder-suicide. Soon thereafter, Lamar became the target of disciplinary action. In an e-mail conversation, her supervisors stated that they needed to "gag" her and decided to incorporate in her workplan a corporate communication policy that would limit her ability to communicate with senior management. Lamar was the only person in the City to have such a corporate communication policy.

In keeping with the City's managerial practices, Lamar prepared a draft of the 1996 Affirmative Action Report ("1996 AA Report"), which she presented to senior management on June 19, 1996 prior to the report's presentation to the City Commissioners. The narrative section of this first draft stated that "we are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for the perceptions of unfairness and a proverbial silence about it all."

The report, through objective bar charts, showed that the City had not hired or promoted any Blacks to senior management positions in Protective Services (Fire and Police Departments), which were the departments that had been subject to Consent Decrees for close to a decade. A few months prior to the issuance of the 1996 AA Report, the City's Police Department was embroiled in a scandal when one of its officers participated in a "police round-up." The officer placed a Black baby doll in a watermelon and then proceeded to beat the doll with a baseball bat. This skit was supposedly a parody of the Rodney King beating incident.

Lamar's report also revealed that the Parks & Recreation Department had no Blacks in Beach Patrol or Lifeguard positions and that there were no senior black managers, which was of particular significance because the McCree Massacre was sparked by racism in this very department. Lamar's supervisors, Hanbury, Witschen, Larkin and Panoch, were not receptive to the report and requested substantive changes and adjustments which would distort the actual data in the report.

Although Lamar made some of the requested adjustments, she refused to shirk her duty to the City Commission and the people of the City by signing her name to a false and misleading report, as was the desire of her supervisors. Hence, Lamar retained the conclusion of the report which analyzed the objective statistical data. Lamar presented the second draft of the 1996 AA Report to her supervisors and then disseminated it to the senior managers who would need to review the report in order to discuss same at their upcoming meeting.

One day after distributing the second draft of the AA Report, her supervisor, Bruce Larkin, requested her resignation. Lamar refused to resign, and sent a memorandum to Larkin and the City Manager stating that she was being retaliated against for opposing the City's discriminatory practices. Shortly thereafter, Lamar was summarily suspended without pay.

Pursuant to the City's Personnel Policy and Standards Manual, the City was required to give Lamar written notice, with an explanation of supporting evidence, for all specific grounds for which the City intended to discipline Lamar. Initially, the City levied eleven reasons for initiating disciplinary action, which was later supplemented with two additional charges.

Shortly after Lamar's suspension, a formal hearing was held pursuant to the City's Personnel policies. Based on this hearing, the City, in a letter by City Manager Hanbury, dated October 17, 1999, set forth the official grounds upon which Lamar's termination were based. The termination was based on only four of the original reasons, to wit: 1) "a pattern of failure to meet deadlines for major work projects and assignments;" 2) engaging in private work on City time; 3) unauthorized use of the City computer for personal endeavors; and 4) over expenditures and mismanagement of the Summer Youth Program. Lamar presented substantial evidence in the district court that established genuine issues of material fact showing pretext with regard to these official reasons for her termination, which would preclude summary judgment.

The October 17, 1996 termination notice did not list insubordination in refusing to alter the 1996 AA Report as a basis for Lamar's termination. Furthermore, Hanbury, Witschen, Larkin and Panoch all admitted that Lamar should not be fired for preparing a report outlining discriminatory employment practices, and that doing so would be illegal. Nevertheless, despite all of the evidence to the contrary, the District Court incorrectly concluded that Lamar was fired for insubordination, and that this was a legitimate, non-discriminatory business reason justifying her discharge.

It should be noted that after Lamar's story broke in the press, the Mayor of the City of Ft. Lauderdale, criticized City Manager, George Hanbury, in his evaluation of the Manager's performance for not being responsive to the elected official's request and for hiding information from the

elected officials. The Mayor references the Lamar incident as evidence of the coverup. City Manager, George Hanbury, departed from the City a few months after the evaluation.

In the aftermath of Lamar's discharge, numerous employees have filed internal complaints of discrimination and charges with the Equal Employment Opportunity Commission (EEOC). The EEOC has concluded in five separate cases that City employees have been illegally discriminated against in violation of Title VII. The City has the ignominy of having more EEOC cause findings than all of the municipalities in South Florida combined. As a result of the EEOC findings in two of those cases, the United States Department of Justice has begun an investigation into the City's employment practices in order to determine whether the City is engaging in a pattern and practice of discrimination. Additionally, an African-American female employee of the City, who Lamar had determined was subject to a hostile work environment, recently won a jury trial against the City. This employee was awarded $275,000 in damages for being subject to a hostile work environment.

The City's refusal to acknowledge and deal with the issues and concerns legitimately raised by Lamar has cost its taxpayers over $2 million in legal fees defending these numerous employment discrimination claims. Racial discrimination is an issue of great public concern in this nation. Lamar's claims against the City of Fort Lauderdale and her supervisors have garnered significant media attention and public concern, both locally and nationally. Additionally, the citizens and employees of the City have organized numerous protests against the discriminatory, hostile work conditions for minority and women employees of the City.

II. Procedural Background.

Lamar filed suit against the City of Ft. Lauderdale, as well as her supervisors, Hanbury, Witschen, Larkin and

Panoch on August 19, 1997 pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq.; the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985; and the First and Fourteenth Amendment to the United States Constitution. Lamar asserted that she was discriminated against because of her race and gender, and that she was retaliated against because of her protected speech.

Defendants filed motions for final summary judgment on October 26, 1998. None of the motions alleged that Lamar was fired because she was insubordinate in refusing to alter the 1996 AA Report. Lamar filed memoranda of law in opposition to the motions, setting forth the disputed material facts in this case. The district court granted all defendants' motions for summary judgment, concluding that the individual Defendants were entitled to qualified immunity and that Lamar was terminated based upon her insubordination.

Subsequently, Lamar filed a motion to alter or amend the court's order granting defendants' motions for final summary judgment. Following the district court's denial of Lamar's motion to alter or amend, Lamar timely filed a notice of appeal with the United States Court of Appeals Eleventh Circuit.

The Eleventh Circuit affirmed the grant of final summary judgment based on the dispositive conclusion that Lamar was terminated for insubordination in refusing to alter the 1996 AA Report. The Eleventh Circuit denied rehearing or rehearing en banc on January 12, 2001.

REASONS FOR GRANTING THE WRIT.

I. The Sixth Circuit and Eleventh Circuit have reached diametrically opposite conclusions as to whether an Affirmative Action/EEO Officer can report discrimination to their superiors without fear of repercussions.

In *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 585 (6th Cir. 2000) a case virtually "on all fours" with the instant case, the Sixth Circuit Court of Appeals ruled that an employee's First Amendment rights are violated when the employee is fired for voicing concerns over the employer's failure to properly implement and comply with its affirmative action program. In that case, plaintiff Johnson, an African American, was hired by the University of Cincinnati to serve as its Vice President of Human Resources and Human Relations (VPHHR). In his capacity as VPHHR, Johnson was in charge of the University's human resources and affirmative action programs. Johnson's obligations in overseeing the affirmative action programs consisted of "maintaining and updating affirmative action programs; analyzing the University's workforce by race and sex; analyzing areas of underutilization of women and minorities; maintaining data regarding the employment of women and minorities; and analyzing the impact of the University's employee selection process," as well as "[developing] new programs, policies and diversity initiatives to improve and enhance the quality of life." *Id.* at 566-67.

The creation of Johnson's position was precipitated by the "state of disarray" into which the University's Affirmative Action Office had fallen prior to his arrival. *Id.* at 566. The University, a federal contractor, was required to meet certain affirmative action obligations, which were imposed by the Office of Federal Contract Compliance (OFCCP) in the form of a conciliation agreement after an investigation of the University's affirmative action

compliance revealed disparities among the African Americans and women employed by the University. *Id.* Nine years after the expiration of the conciliation agreement, however, a University wide report revealed that "although African Americans occupied 28% of the University's total staff, they occupied the lower employment categories . . . in vastly disproportionate numbers." *Id.* at 567. As a result of these findings, the University implemented a new affirmative action plan with the specific goal of increasing the number of minorities in upper level positions. *Id.* The University's initiative was to be headed by the VPHHR, the position for which Johnson was selected. *Id.* at 568.

Upon commencing his appointment, Johnson was saddled with a backlog of what he perceived to be an excessive number of A-900 forms, which the University used for tracking whether a particular vacant position was "underutilized" by women and minorities. *Id.* As a result, Johnson sent a memorandum to Cabinet members entitled, "Is there an Affirmative Action Commitment?" *Id.* The memorandum set forth his concerns on the large number of waivers, questioned the University's overall commitment to meeting its affirmative action goals, and warned that continued violations could result in a new conciliation agreement being enforced by the OFCCP. *Id.*

Following the submission of his affirmative action memorandum, Johnson was not allowed to contribute his expertise on human resource issues when the University Hospital merged with a health care management company, despite the fact that human resource officials from the other affected hospitals were regularly involved. *Id.* Additionally, when the University Hospital sought to hire a Senior Executive Officer, Johnson's choice of an African American male was out voted in favor of a white male. *Id.* Ostensibly, the selection of a white male did not sit well with Johnson, and as a result, the University Senior Vice President agreed that Johnson would direct the search for the next two senior level positions to be available at the hospital, and that he

should place special emphasis on targeting minorities to fill the positions. *Id.* However, a year later the vice president acted in contravention to his agreement with Johnson by requesting an A-900 waiver in order to allow a former College of Medicine faculty member to fill the newly vacant vice chairmen of surgery position. *Id.* at 569. The waiver was approved despite Johnson's protests, which included yet another letter "questioning the University's commitment to providing equal opportunities in employment." *Id.*

Within a matter of months after Johnson distributed his second memorandum calling into question the University's EEO compliance, Johnson filed an EEOC complaint alleging race and retaliatory discrimination in violation of Title VII. *Id.* at 570. Specifically, Johnson alleged that the University was discriminating against him based on his race by excluding him from participating in human resource matters regarding the University Hospital, and that he was being retaliated against for protesting the hiring of a white male to fill the hospital's Senior Executive Officer position. *Id.* In response, the University President, Dr. Steger, sent Johnson a memorandum outlining Johnson's purported performance deficiencies as VPHHR. *Id.* To this end, Johnson pointed out that Dr. Steger had rated Johnson highly in leadership and vision for the future in his two prior evaluations. *Id.* Nonetheless, Johnson was terminated the day after he responded to Dr. Steger's performance deficiency memorandum. *Id.*

In his amended complaint Johnson alleged, *inter alia*, that the University violated his First Amendment right to free speech by retaliating against him for voicing his concerns on the University's failure to properly implement and comply with its affirmative action program. *Id.* at 583. The district court found that although Johnson's speech pertaining to the University's affirmative action noncompliance was a matter of public concern, the court granted summary judgment in favor of the University based on the conclusion that "the University's interests in maintaining its hiring process

without disruption outweighed [Johnson's] right to free speech." *Id.* at 584. However, on appeal the Sixth Circuit disagreed that the University's purported interest outweighed Johnson's First Amendment rights. *Id.* In reversing the district court's holding on Johnson's First Amendment claim, the Sixth Circuit relied on its prior decision in *Meyers v. City of Cincinnati*, 934 F.2d 726, 730 (6th Cir. 1991), where the court held that the plaintiff's statements "in direct contravention of city policy on affirmative action" were protected under the First Amendment.

The court in *Meyers* held that the plaintiff could not be constructively discharged for making the anti-affirmative action statements because

> [i]n order to justify a restriction on speech of public concern by a public employee, plaintiff's speech must impair discipline by superiors, have a detrimental impact on close working relationships, undermine a legitimate goal or mission of the employer, impede the performance of the speaker's duties, or impair harmony among co-workers.

Id.

In the instant case, as in *Johnson*, "the contested issues of fact, based upon the parties' differing characterizations of the evidence, are very much in dispute and would be best left for determination at trial." *Id.* Here, the lower court erroneously concluded that the City's interest in having Lamar prepare a report that did not reveal the extent of the City's discrimination was legitimately related to promoting the efficiency of its public services. To the contrary, the City's "legitimate" interest in efficiency is served by Lamar's reporting systemic discrimination, in full accordance with her formal job description, and not merely in having her prepare a report that "conformed" to her supervisors' expectations. To be sure, while her supervisors'

may have been motivated by serving their own self serving interests in appearing to comply with EO and AA laws, their interest in self-preservation is not part of this Constitutional balance. A public entity should never be deemed efficient due to its violation of federal and state law.

In both *Johnson* and the instant case, the employees were hired to remedy deficiencies in the area of affirmative action. In both cases, the employers were subjected to a formal Consent Decree in order to remedy discriminatory hiring practices. Pursuant to their job descriptions, both employees were required to monitor their employer's compliance with Equal Employment Opportunity practices, and both were subjected to disciplinary action for honestly reporting their employer's deficiencies in this area. Specifically, although Lamar and Johnson had been given good evaluations prior to their speech, both plaintiffs were terminated within a very short period of time of reporting the deficiencies. In *Johnson* however, the Sixth Circuit reversed the district court's grant of summary judgment because the court of appeals could not determinatively conclude that Johnson's alleged failure to comply with the A-900 waiver procedure was causing the type of disruption that would warrant overriding Johnson's rights in expressing his views on the University's failure to comply with its affirmative action policies. *Id.* at 587. To this end, the court stated that,

> [e]ven if [Johnson's] speech delayed the University's hiring of prospective employees, this does not rise to the level of having a detrimental impact on close working relationships or undermining a goal or mission of the University. To the contrary, [Johnson's] speech regarding the University's failure to comply with it's a-900 process promoted or advance the University's alleged goal of employment equality for women and

> minorities; his speech did not undermine that goal.

Id. (internal citations omitted).

In the instant case, Lamar presented her report to her immediate supervisors, Panoch and Larkin, then distributed the report for review by other senior level managers prior to a scheduled meeting. One of the defendants, John Panoch, testified that if Lamar gave him the report before distributing it that she would be in compliance with the corporate communication policy. Additionally Mr. Panoch has admitted that it was common practice, and not to mention more efficient, to distribute documents before a meeting so that those in attendance would be able to review the documents prior to the meeting. Thus, Lamar did exactly what her job description called for with respect to the presentation of her report, and acted in an efficient manner.

Moreover, Lamar's conduct in honestly reporting her findings did not disrupt the efficient operation of the City. Rather, the City's systemic discrimination toward its employees unarguably has a detrimental impact on efficiency. The numerous EEOC filings detract from the smooth operations, as they divert resources and time away from delivering services to the community. Employees forced to undergo unfair discriminatory practices do not operate at maximum efficiency, and do not perform as a cohesive unit. This fact was exemplified by the McCree Massacre, which resulted in the death of several workers, and undoubtedly affected the efficiency of City operations. In contrast to the chaotic result of the City's efforts to maintain the status quo, it was Lamar's intent to faithfully perform her job duties so as to direct the City towards a more efficient, harmonious work atmosphere for all employees, regardless of race or gender. Ultimately, the District Court's determination that hiding violations of the law is more efficient than taking prompt remedial action, runs contrary to the congressional intent of the Civil Rights laws.

While it is true that "a public employee's speech dealing with 'matters only of personal interest' is not afforded constitutional protection," *id.* at 583-84 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)), here Lamar's speech did not address a matter of only personal interest. Lamar's report contained her professional opinion, which was based on the empirical data she was required to gather. As in *Johnson*, the data that Lamar gathered clearly indicated that the City was not in compliance with its affirmative action mandates. However, in stark contrast to the Sixth Circuit's decision in *Johnson*, the Eleventh Circuit's decision in the instant case has essentially foreclosed the ability to report, publicly or privately, on non-compliance of affirmative action mandates.

II. The Eleventh Circuit has entered a decision which, in abrogation of Title VII, forecloses any opposition to discrimination by a management employee with affirmative action responsibilities.

This Court should grant certiorari in order to settle the conflicting Circuit Courts of Appeal decisions regarding an equal opportunity/affirmative action employee's rights to oppose discrimination. Furthermore, certiorari should be granted because this Court has not yet addressed the important question of what is considered reasonable opposition to workplace discrimination on the part of a managerial employee with equal opportunity/affirmative action responsibilities, especially in light of the Courts of Appeal decisions holding that public confrontation and public disclosure of an employer's confidential information is not protected conduct.

> [W]hen the action taken by an official is the advocacy of hiring practices that do not discriminate on the basis of race, sex, or ethnicity–such as Plaintiff's advocating a

> nondiscriminatory hiring practice . . . the advocacy can indeed be considered protected conduct under Title VII and § 1981.

Johnson, 215 F.3d at 578. Under Title VII, the only qualification that is placed upon an employee's opposition is that it must be reasonable. *Id.* at 580. In the instant case, the district court and the Eleventh Circuit Court of Appeals rendered findings that directly conflict with prior decisions of the Eleventh Circuit and other circuit courts of appeal. Specifically, these decisions are in conflict with respect to their positions on an affirmative action/EEO employee's rights to publicly or privately oppose his or her employer's discriminatory hiring practices.

In its holding in *Lamar*, the Eleventh Circuit stated, "[w]e caution that this would be a different case if Rice-Lamar had used a means of communication that was not under the exclusive control of her employers." 232 F.3d at 842. The court then went on to state that,

> [a]lthough we intimate no view concerning the outcome of such a case, different considerations would obviously come to the fore if Rice Lamar had, for example, written an editorial for a local newspaper, or even if she had attempted to communicate her concerns privately to the City Commission.

Id. This opinion was also expressed by the district court, which expressly stated that

> Lamar may very well be correct that the citizens of the City were entitled to know about her opinion that systemic discrimination was widespread within the City government.

54 F.Supp.2d at 1144. The district court further stated that

> Lamar may have been entitled as a citizen to express her opinions about what she honestly perceived as systemic discrimination in the hiring and promotion practices of the City with respect to its employees ...

Id. at 1148.

In finding Lamar was entitled to express her opinion as a public citizen and intimating that the case may well have been decided differently if she had done so, both courts are in direct conflict with prior decisions of the Eleventh Circuit. The Eleventh Circuit has previously held that although the content of speech may be protected, public confrontation or public disclosure of private information by a management employee is not protected. *See, Hamm v. Members of Bd. of Regents*, 708 F.2d 647, 653 (11th Cir. 1983).

In *Hamm,* a university equal employment opportunity specialist filed suit against the university and university officials, alleging sex discrimination and retaliation for activity protected by the First Amendment and Title VII. 708 F.2d at 649. Hamm, a Hispanic female, was a special assistant to the vice president for administration. *Id.* at 651.

Shortly after her appointment, Hamm began experiencing various difficulties because of what, in her view, were restrictions placed on the performance of her duties. *Id.* After Hamm was requested to investigate the termination of an employee from the university's security department, she wrote a report of her findings in which she recommended that the employee be rehired. *Id.* at 652. At the employees request, Hamm gave a copy of the report to the student newspaper, which printed an article about the termination and quoted the report. *Id.* There was some dispute as to whether Hamm's supervisor had seen the report prior to the disclosure. *Id.*

In affirming the district court's dismissal and addressing the issue of "going public," the Eleventh Circuit in *Hamm* stated that because the university placed her in a position that required loyalty to her supervisor, Hamm's

releasing of investigative reports to the campus newspaper, without prior approval, constituted unreasonable opposition to discrimination. *Id.* at 653. The Eleventh Circuit found that rather than supporting a claim of retaliation, in "going public" Hamm "repeatedly chose to work outside the framework USF was attempting to establish to deal with discrimination claims." *Id.* at 654.

Likewise, the Fifth Circuit has held that disclosing an employer's private information to a compliance committee or the press, is not protected activity. *See*, *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1326-27 (5th Cir. 1980). In *Whatley*, the plaintiff, who was hired by a public transportation department as director of compliance in the equal employment opportunity office, filed suit against the department alleging that his dismissal was improper retaliation for assisting other employees in filing discrimination complaints. 632 F.2d at 1326.

Without consulting his supervisor, Whatley made derogatory comments about the state of the department's equal employment affairs before a compliance committee and the press. *Id.* Whatley suggested that federal funding could be cut off if the department's alleged non-compliance was not stopped. *Id.* Whatley also suggested that an employee file a complaint with the EEOC, when the departmental policy was to first advise the employee to file a complaint with the transportation authority. *Id.* at 1327. In affirming the district court's dismissal of the case, the Fifth Circuit found that Whatley had not followed the department's rules, and deemed his conduct regarding going to the compliance committee and the press, and his handling of the employee's complaint as a "failure to follow prescribed administrative procedures," which is not "statutorily protected activity." *Id.* at 1328. *See also*, *Pendleton v. Rumsfeld*, 628 F.2d 1102, 1108 (D.C. Cir. 1980) (upholding the dismissal of equal employment opportunity employees that participated in an office demonstration).

Some district courts have also found that divulging an employer's confidential information is unprotected conduct. *See, Herrera v. Mobil Oil, Inc.*, 53 FEP cases 1406, 1407-08 (W.D. Tex. 1990) (dismissal of an employee relations employee that divulged the employer's confidential information to other employees); *Novotny v. Great American Fed. Sav. & Loan Ass'n*, 539 F.Supp.437, 451-52 (W.D. Pa. 1982) (finding that opposing discrimination through public confrontation is an unreasonable means of opposition to discrimination). *But see, Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 579 (6th Cir. 1997) ("Constitutional protection for speech on matters of public concern is not premised on the communication of the speech to the public.")

Under *Hamm*, *Whatley*, and the aforementioned case law, Lamar could have been legitimately terminated and deemed insubordinate for disclosing the private information of the City to the public. In accordance with the prevailing case law, Lamar did not "go public" with her concerns, but rather, as the court advised in *Hamm*, attempted to voice them internally to City management, which resulted in her termination.

The Eleventh Circuit's holding in Lamar, when read in conjunction with *Whatley* and *Hamm*, effectively forecloses all means of opposing discrimination in derogation of Title VII. It stands to reason that if Lamar could be fired for distributing a report to senior management in accordance with her job description, with statistical evidence to support her conclusion of systemic discrimination, then a manager cannot reasonably report or oppose discrimination. An Affirmative Action Officer, or any manager for that matter, based on the Eleventh Circuit's holdings, cannot publicly or privately report acts of discrimination, which means there can be no reasonable opposition to discrimination.

III. The Eleventh Circuit entered a decision that conflicts with the important public policy consideration of promoting discourse among public officials.

This Court has stated that, "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Rankin v. McPherson* 483 U.S. 378, 388 (1987). In order to give freedom of expression the breathing space it needs to survive . . . statements criticizing public policy and the implementation of it must be protected." *Rankin*, 483 U.S. at 389. In the context of public employment, the extent to which a municipality may restrict an employee's right to speak is limited by the First and Fourteenth Amendments to the United States Constitution. *See Connick*, 461 U.S. at 142.

In essence, the Eleventh Circuit has concluded that a public manager who has a duty to report on EEO/AA violations and advise management on potential EEO liabilities, such as Lamar, can be fired for insubordination for reporting violations of law. Not only does this ruling fly in the face of Title VII, but it also sets a precedent that will diminish public officials' ability under the First Amendment to express their concerns regarding a public entity's violation of the law in other arenas.

The district court found that, "Lamar was certainly in a position to obtain knowledge about whether there was systemic discriminatory hiring and promotion practices in the City." *Rice- Lamar*, 54 F.Supp.2d at 1144. If a public official, who is admittedly the most knowledgeable in the field, is fired for honestly reporting results based on substantial evidence, then managers across the nation will be able to suppress important matters of public concern. Carrying the lower courts' ruling to its logical extreme, a city engineer could be fired for reporting that a bridge is

structurally unsound merely because doing so would contradict his superior's wrongful desire for silence. Similarly, a water treatment manager could be fired for reporting that the water supply is unsafe. The implications of the Eleventh Circuit's opinion in *Lamar* is that the public welfare can be placed in jeopardy for the illegitimate, self-serving interests of individuals who have the power to terminate employees who attempt to serve the public interest by honestly reporting on matters of great public concern.

The *Lamar* decision sets this Country's public policy concerns of promoting freedom of speech back one giant step. The Eleventh Circuit has, in effect, completely foreclosed an Affirmative Action Officer's ability to report findings of discriminatory practices in instances where a governmental entity chooses to cover up its unlawful practices as opposed to remedying the practices. Under the Eleventh Circuit's inconsistent rulings, Lamar could not legally report her findings internally to the City's managers. *Rice-Lamar*, 232 F.3d at 842. Conversely, Lamar could not legally report her findings outside of the City hierarchy without being subject to discipline. *Hamm*, 708 F.2d at 653. This result flies in the face of the principles established by the United States Supreme Court in *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968), which seeks as its fundamental goal the promotion of public discussion on issues of great public concern. The Eleventh Circuit's opinion in the instant case does not promote the ideals set forth in *Pickering* for protecting Lamar's First Amendment right to speak on the issue of the City's documented, statistically supported, discriminatory practices. Should the *Lamar* decision stand, governmental entities will have unbridled authority to stifle public officers, like Lamar, from performing their critical job functions of ensuring compliance with federal laws.

The *Lamar* decision also creates a legal basis for public managers to hide or cover up information from elected officials. In the instant case, the City Commission requested the report so that they could insure that the City Managers

were addressing past transgressions and complying with the Consent Decree. The elected officials also knew that valuable federal funding could be lost if the City violated EEO laws. These elected officials were barred from receiving information from the most knowledgeable professional at the City. The City Managers, in an attempt to add legitimacy to the report that was eventually submitted to the City Commissioners, stated falsely that the statistics were prepared by Lamar.

Moreover, these rulings contradict the spirit and intent of public policy-based Whistleblower laws, such as The Florida Whistleblower Act, §112.3187, Fla. Stat., et. seq., which are geared to promoting the disclosure of a public employer's unlawful violations of law by employees with knowledge of such violations. In the instant case, Lamar decided to oppose the discriminatory practices, as a matter of conscience. Lamar believed that the McCree Massacre, resulting in 13 orphans, could have been avoided if she had spoken out earlier against the City's emotionally destructive employment practices.

The Eleventh Circuit in this case held that the City's interest is "in promoting the efficiency of the public services it performs through its employees." *Rice-Lamar*, 232 F.3d at 841. While Lamar does not disagree with this contention, it is critical to the efficiency and effectiveness of our government that serious violations of law be uncovered and dealt with, not hidden. The City' efforts to suppress information pertaining to serious and detrimental discriminatory practices does not promote efficiency. Rather, it has resulted in the maintenance of a discriminatory environment in violation of federal and state laws and is forcing employees to seek redress through the courts rather than "efficiently" resolving the problems internally.

Despite the City's denial of discrimination, the U. S. Equal Employment Opportunity Commission has concluded in five separate cases that City employees have been illegally discriminated against. The United States Department of

Justice is also in the midst of an investigation into the serious allegations of racial discrimination by the City against its employees.

The City's refusal to acknowledge and deal with the issues and concerns legitimately raised by Lamar has cost the taxpayers over $2 million in legal fees defending these numerous employment discrimination claims and could result in the loss of valuable federal grants. A more efficient use of those tax dollars would have been to take action to remedy the pervasive problems of discrimination in the City, which Lamar attempted to bring to the City's attention prior to her wrongful termination. This Court's concern for the efficient operation of governmental entities is best served by not providing the entity with a legal basis to compel its managers who have equal opportunity/affirmative action responsibilities to lie in order to maintain employment.

Lamar's challenge of the City's actions of terminating her employment and attempting to cover up its ongoing discriminatory practices against women and minorities has garnered local and national attention in the media, and has been the subject of analysis in legal periodicals and journals. The widespread implications of the lower courts' decisions in this case is a matter of national concern. If the decision in this case is allowed to stand, the position of affirmative action officer will be relegated to that of a "stage dummy" to assist governmental entities in masking discriminatory practices rather than its intended critically importa..t function of safeguarding the basic rights afforded to women and minorities under the laws of this land.

CONCLUSION.

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 8, 2000

(FOOTNOTES TO OPINION APPEAR AT END OF TEXT)

United States Court of Appeals, Eleventh Circuit

Deborah RICE-LAMAR, Plaintiff-Appellant,
v.
CITY OF FORT LAUDERDALE, FLORIDA, a municipality, George Hanbury, individually,
Pete Witschen, Asst. City Attorney, individually, Bruce Larkin, individually,
John Panoch, individually, Defendants-Appellees.

No. 99-12951.

Nov. 8, 2000.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, MARCUS and CUDAHY, Circuit Judges.

TJOFLAT, Circuit Judge:

I.
A.

The City Manager's Office (the "CMO") in the City of Ft. Lauderdale, Florida, oversees a large and complex bureaucratic structure. Under the CMO, which includes not only the City Manager, himself, but also Assistant City Managers and various other personnel, are seven City Departments: Police, Public Services, Fire Rescue and

Building, Administrative Services, Finance, Parks and Recreation, and Planning and Economic Development. Each Department is comprised of several Divisions. One such Division within each of the Departments is the Personnel Division.

The City Manager serves at the pleasure of an elected City Commission. In order to ensure racial, ethnic, and gender diversity in the City's hiring practices, the Ft. Lauderdale City Commission requested that the CMO prepare annual reports detailing the City's progress in hiring and retaining minority employees. The CMO assigned this task to the Affirmative Action Specialist, who reports to the Director of Personnel in the Administrative Services Department.

On June 20, 1988, Deborah Rice-Lamar, an African-American female, was hired to be the City's Affirmative Action Specialist. Rice-Lamar's job description stated that one of her principal tasks was to "advise[ ] departmental and personnel officials as well as the City Manager on potential EEO liabilities and on strategies for achieving ... long term [affirmative action] goals."[1] Though her "work [was to be] performed with considerable independent judgment, discretion and initiative," the job description made clear that it was also to be "reviewed by an administrative superior through conferences, periodic reports, and observation of results achieved." Rice-Lamar presented the 1996 Affirmative Action Report at a Department meeting on June 19, 1996. Entitled "Economic Integration: Affirmative Action for the New Millennium," the report included a dramatic personal commentary by Rice-Lamar, which stated:

> [W]e are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for perceptions of unfairness and a proverbial silence about it all.

> We make plans for valuing and managing diversity initiatives within the City which should create an environment where differences are valued as an advantage[,] not just tolerated. However, differences must first be acknowledged before either tolerated or valued. Recommendations on the City's diversity initiative are forthcoming; however, I will take this opportunity to foretell that they will acknowledge our need to address some basic problem of "ism" while moving toward an environment which values diversity and manages diversity for the betterment of all.

Also included were statistical graphs indicating the number of African-American, Hispanic, and female City employees in management and professional positions.

George Hanbury, the City Manager, Pete Witschen, an Assistant City Manager, Bruce Larkin, the Director of the Administrative Services Department, and John Panoch, the Director of the Personnel Division of the Administrative Services Department, all expressed serious reservations about the content of the report, and requested that Rice-Lamar make various substantive changes before the report was delivered to the City Commission. In particular, Rice-Lamar's superiors directed her to remove the personal commentary, and to draft a report that focused on the statistical data collected on minority and female representation in the City workforce. Rice-Lamar refused to alter the report substantially. On July 22, 1996, she left a revised copy of the report in Larkin's and Panoch's respective offices, with a message that it was ready for printing and distribution. The report still contained much of the personal commentary that her superiors had directed her to remove.[2]

On July 26, Larkin met with Rice-Lamar and offered her the opportunity to resign. She refused, stating in a letter to Larkin that

> [t]he Affirmative Action Report ... honestly and objectively outlines racial problems and tensions in the City. Apparently, your concern over public image have [sic] led you to suppress the publication of my report and request my resignation.

On July 29, without Larkin's review or approval, Rice-Lamar distributed the report to Hanbury, and all but one of the Department heads. On August 12, Rice-Lamar was notified by memorandum from Panoch of possible disciplinary action against her, based, in part, on the fact that "numerous deadlines [had been] missed and instructions [were] not followed" with regard to the "Affirmative Action presentation and report." After affording Rice-Lamar an opportunity to be heard, Larkin recommended to the City Manager that she be discharged. The City Manager accepted the recommendation and discharged her effective October 21, 1996.

B.

Rice-Lamar brought this suit against the City of Ft. Lauderdale, Hanbury, Witschen, Larkin, and Panoch in the United States District Court for the Southern District of Florida. In a twelve-count complaint,[3] she sought money damages and, alternatively, reinstatement and back pay, against the City and the individual defendants for discriminating against her on account of her race and sex, in violation of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994),[4] and 42 U.S.C. § 1981 (1994),[5] and for infringing her First Amendment right to free speech.[6] As a vehicle for recovery,

Rice-Lamar invoked 42 U.S.C. § 1983 (1994).[7] Finally, she claimed that the individual defendants had conspired to discriminate against her on account of her race and sex in violation of 42 U.S.C. § 1985(3) (1994).[8]

In their answers to Rice-Lamar's complaint, the defendants denied liability and the individual defendants claimed qualified immunity from suit.

Following discovery, the defendants moved for summary judgment. The district court granted their motions, concluding that Rice-Lamar failed to make out a case under any of her theories of liability. The court also concluded that the individual defendants were immune from suit under the doctrine of qualified immunity. We now affirm the court's judgment. We do so on the basis that the record before the district court was insufficient as a matter of law to establish any of Rice-Lamar's claims for relief. (We therefore do not reach the question whether any individual defendant is entitled to qualified immunity.)

II.

We review *de novo* orders granting a motion for summary judgment. *Warren v. Crawford*, 927 F.2d 559, 561 (11th Cir.1991). "The district court's conclusion[s] of law [are] subject to complete and independent review by this court." *In re Sure-Snap Corp.*, 983 F.2d 1015, 1017 (11th Cir.1993).

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91

L.Ed.2d 265 (1986). When the non-moving party bears the burden of proof on an issue at trial, the moving party need not "support its motion with affidavits or other similar material *negating* the opponent's claim," Id. at 323, 106 S.Ct. at 2553, in order to discharge this initial responsibility. Instead, the moving party simply may " 'show[ ]'-that is, point[ ] out to the district court-that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970)).

In response to a properly supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the non-moving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then the court must enter summary judgment for the moving party. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552. In determining whether genuine issues of material fact exist, we resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

III.

We first address Rice-Lamar's First Amendment free speech claim. Second, we address her claim that she was discriminated against on the basis of her race and sex.

A.

It is well established that a state may not discharge a public employee in retaliation for public speech. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315

(1987). This circuit employs a four-part test to determine whether a state (or, as in this case, a city) has done so.

> First, a court must determine whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983); *Rankin*, 483 U.S. at 384, 107 S.Ct. at 2896; *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir.1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994) (citing *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989)). Speech addresses a matter of public concern when the speech can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690....
>
> Second, a court must weigh the employee's "[F]irst [A]mendment interests" against the interest of the City, as an employer, "in promoting the efficiency of the public services it performs through its employees." *Morgan*, 6 F.3d at 754. In performing this balancing test, a court must consider several factors: (1) whether the speech at issue impeded the government's ability to perform its duties effectively; (2) the manner, time and place of the speech; and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-55, 103 S.Ct. at 1692-94; *Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir.1988), *cert. denied*, 489 U.S. 1013, 109 S.Ct. 1124, 103 L.Ed.2d 187 (1989)....
>
> Third, a court must determine whether the speech in question played a "substantial part"

> in the government's decision to discharge the employee.... Fourth, if the employee shows that the speech was a substantial motivating factor in the decision to discharge him, the City must prove by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct.

Fikes v. City of Daphne, 79 F.3d 1079, 1083-85 (11th Cir.1996).

We will assume without deciding that Rice-Lamar's expression constitutes speech on a matter of public concern, and dispose of the issue on the ground that her First Amendment interests are outweighed by the City's interest, as an employer, "in promoting the efficiency of the public services it performs through its employees." *Morgan*, 6 F.3d at 754 (internal quotation marks omitted).[9]

> [I]n weighing the State's interest in [disciplining] an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315 (1987). In the instant case, one of Rice-Lamar's primary responsibilities within the Ft. Lauderdale Department of Administrative Services was to write an annual Affirmative Action Report to be presented to the City Commission. Although her job description stated

that Rice-Lamar was to perform her job "with considerable independent judgment," all of her work was ultimately to be "reviewed by an administrative superior through conferences, periodic reports, and observation of results achieved." Because Rice-Lamar refused to alter the report in accordance with her superiors' instructions, any First Amendment interest she may have had in publishing her views is outweighed by the City's interest in producing an official document that conformed to the City's expectations.

As Justice Brennan stated in his dissent in *Connick*:

> [p]erhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

Connick, 461 U.S. at 163 n. 3, 103 S.Ct. at 1699 n. 3 (Brennan, J., dissenting). Contrary to Rice-Lamar's perception, her job with the City did not involve utilizing the City's resources to crusade for her personal vision of social justice; her job was to follow her superiors' lawful instructions. By declining to alter the Affirmative Action Report after she was given a direct order to do so, Rice-Lamar flatly refused to perform a lawful task within the scope of her duties. "Such refusal to abide by a valid order is closely connected with, and can be classified as insubordination." *Hankard v. Town of Avon*, 126 F.3d 418, 423 (2d Cir.1997) (holding that employees could be fired for refusing to obey government employer's order to alter a report concerning racial discrimination allegedly committed by another employee).

In a very real sense, the report cannot even be classified as Rice-Lamar's speech at all. The report was the *City's* document. Although Rice-Lamar collected the statistics and wrote the words contained in the report, she did so at the behest of her employer; and the report was subject to her superiors' approval before it could be distributed to the City Commission. Just as a government employer has only a limited right to control its employees' speech, employees also have very little right to control the content of their employer's speech.[10]

We caution that this would be a different case if Rice-Lamar had used a means of communication that was not under the exclusive control of her employer. Although we intimate no view concerning the outcome of such a case, different considerations would obviously come to the fore if Rice-Lamar had, for example, written an editorial for a local newspaper, or even if she had attempted to communicate her concerns privately to the City Commission. In the instant case, however, Rice-Lamar attempted to publish her personal views in a document that was both under the control, and vested with the authority, of her employer, the City of Ft. Lauderdale. Civil servants cannot cry foul when they attempt to use their government employers as stage dummies, and are then disciplined for it.

B.

Rice-Lamar also contends that the district court erred in granting summary judgment to all the defendants on her claims of discrimination under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983, and 1985(3).

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), a plaintiff can establish a *prima facie* case that she was

discriminated against in violation of Title VII by showing: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated employees who are not members of the plaintiff's class more favorably; and (4) she was qualified for the job or job benefit at issue. *See Holifield v. Reno*, 115 F.3d 1555, 1561-62 (11th Cir.1997). Once a *prima facie* case is shown:

> the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity....
>
> ... [The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981).[11]FN_F01211

In the instant case, the district court found that even though

> there are genuine issues of material facts with respect to whether [Rice- Lamar] has established her prima facie case ... [,] there are no genuine issues of material facts as to whether the City's stated legitimate, nondiscriminatory reasons for its actions were pretextual.... [I]t is undisputed that [Rice-Lamar] was disciplined for refusing to follow her supervisors' instructions. Although the subject matter of the dispute between [Rice-Lamar] and her supervisors involved race and gender discrimination, the City's actions with respect to [Rice-Lamar] herself were not due to her race or gender. Rather, they were due to her insistence on including her own conclusions in the Affirmative Action Reports against her supervisors' wishes.
> *Rice-Lamar v. City of Ft. Lauderdale*, 54 F.Supp.2d 1137, 1146 (S.D.Fla.1998) (footnote omitted).

Rice-Lamar does not dispute that she refused to alter substantially the Affirmative Action Report, and she has failed to present any evidence indicating that other insubordinate employees were treated more favorably. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2107, 147 L.Ed.2d 105 (2000) (finding error in grant of judgment as a matter of law to defendant in an age discrimination claim, in part because plaintiff "made a substantial showing that [defendant's] explanation [for the adverse employment action] was false"). In response to a properly supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial."

Fed.R.Civ.P. 56(e).[12] Because Rice-Lamar has failed to present any evidence demonstrating that the City's proffered explanation is pretextual, the district court did not err in granting summary judgment to the defendants on her discrimination claims.[13]

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to the defendants on all claims.

AFFIRMED.

FOOTNOTES TO OPINION

FN1 Specifically, Rice-Lamar's "Work Plan" (a document that was separate from the job description) stated that one of her principal tasks was to compile "Annual City-Wide Updates" regarding affirmative action in City employment.

FN2 The revised report stated: [W]e are still a City plagued with real and/or perceptions of racism, glass ceilings for women and walls for people of color. These issues whether real or perceived must be discussed. For that reason we make plans for valuing and managing diversity initiatives within the City which should create an environment where differences are valued as an advantage[,] not just tolerated. However, differences must first be acknowledged before either tolerated or valued[;] therein lies the need for discussion. Recommendations on the City's diversity initiative are forthcoming and will acknowledge our need to address some basic problem of "ism" while moving toward an environment which values diversity and manages diversity for the betterment of all.

FN3 We refer to Rice-Lamar's second amended complaint as the complaint.

FN4 42 U.S.C. § 2000e-2(a) makes it unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. We realize that Title VII only allows suits against an "employer." We mention Rice-Lamar's Title VII claims against the individual defendants, who are not Rice-Lamar's employers, for the sake of completeness only.

FN5 42 U.S.C. § 1981 provides: (a) Statement of equal rights - All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) "Make and enforce contracts" defined - For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment - The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law. We assume without implying any view on the matter that the individual defendants can be properly sued under section 1981 in these circumstances.

FN6 The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech...." U.S. Const. amend. I. This right was made applicable to the states by the Fourteenth Amendment. Everson v. Board of Educ., 330 U.S. 1, 8, 67 S.Ct. 504, 508, 91 L.Ed. 711 (1947).

FN7 42 U.S.C. §1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FN8 42 U.S.C. §1985(3) provides: If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived

may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

FN9 The question of whether a plaintiff's First Amendment interests outweigh the employer's interest in promoting the efficiency of the public services it performs is a question of law subject to *de novo* review. *See Connick*, 461 U.S. at 150 n. 10, 103 S.Ct. at 1692 n. 10.

FN10 Our notice of the fact that the Affirmative Action Report may not be accurately characterized as *Rice-Lamar's speech (as opposed to the City's* speech) heightens our doubt that the speech at issue should receive any First Amendment protection. *See Youker v. Schoenenberger*, 22 F.3d 163, 166 (7th Cir.1994) ("[T]he speech in the present case is not protected because it was not speech as a citizen because [the plaintiff] represented, without authority, that it was [the government employer's] official speech.").

FN11 The elements of a section 1983 claim of race or gender discrimination are the same as the elements of a Title VII disparate treatment action. *See Cross v. Alabama Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507-08 (11th Cir.1995). The elements of a claim of race discrimination under 42 U.S.C. § 1981 are also the same as a Title VII disparate treatment claim in the employment context. *See Peterson v. BMI Refractories*, 132 F.3d 1405, 1412 n. 13 (11th Cir.1998).

FN12 Rice-Lamar argues that the defendants never alerted her that part of the City's nondiscriminatory rationale for her discharge was her insubordination in connection with the 1996 Affirmative Action Report. Defendants' answer to plaintiff's complaint, however, states that "Defendants admit that Plaintiff was suspended and then terminated for distributing the 1996 Affirmative Action Report ... to senior

management employees without obtaining the prior approval of her supervisors."

FN13 Our disposition of Rice-Lamar's discrimination claims obviates the need for us to address her conspiracy claim under 42 U.S.C. § 1985(3). We affirm without discussion the district court's denial of Rice-Lamar's motion to amend her complaint to state a claim of retaliation under Title VII.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 25, 1998

(FOOTNOTES TO OPINION APPEAR AT END OF TEXT)

United States District Court, S.D. Florida.

Deborah RICE-LAMAR, Plaintiff,
v.
CITY OF FORT LAUDERDALE, et al., Defendants.

No. 97-7007-CIV.

Nov. 25, 1998.

ORDER GRANTING FINAL SUMMARY JUDGMENT FOR DEFENDANTS

DIMITROULEAS, District Judge.

THIS CAUSE is before the Court upon the following motions:

1. Defendant John Panoch's Motion for Summary Judgment [DE 135];

2. Defendant Bruce Larkin's Motion for Summary Judgment [DE 137];

3. Defendant Pete Witschen's Motion for Summary Judgment [DE 139];

4. Defendant George Hanbury's Motion for Summary Judgment [DE 141]; and

5. The Defendant City of Fort Lauderdale's Motion for Summary Judgment [DE 143].

The Court has carefully considered the motions and is otherwise fully advised in the premises.

I. BACKGROUND

The plaintiff, Deborah Rice-Lamar ("Lamar"), an African-American female, brought the present action pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991 ("Title VII"), and 42 U.S.C. §§ 1981, 1983 and 1985(3) against her former employer, the City of Fort Lauderdale ("the City"), and against her former supervisors, George Hanbury ("Hanbury"), the City Manager, Pete Witschen ("Witschen"), the Assistant City Manager, Bruce Larkin ("Larkin"), the Director of Administrative Services, and John Panoch ("Panoch"), the Director of Personnel, in their individual capacities (collectively referred to as the individual defendants). Lamar had worked for the City as its Affirmative Action Specialist from June 20, 1988 until her employment was terminated on October 21, 1996. In her twelve count Second Amended Complaint, Lamar has asserted the following claims: (1) violation of Title VII by the City (Count I); (2) violation of 42 U.S.C. § 1983 by all of the defendants (Counts II through VI); (3) violation of 42 U.S.C. § 1985(3) by all of the defendants (Count VII); and violation of 42 U.S.C. § 1981 by all of the defendants (Counts VIII through XII). The essence of Lamar's complaint is that she was retaliated against for exercising her freedom of speech rights and she was discriminated against based upon her race and gender.

II. FACTS

The Court notes that the material facts are not in dispute.[1] Specifically, prior to January 1995, Lamar had

never been the subject of any disciplinary action and had always received above average performance evaluations. Sometime during 1995, Lamar prepared the City's official 1995 Affirmative Action Report (hereinafter "Affirmative Action Report" or "Report") which indicated that the City needed to take a new direction to end the systemic discrimination within the City government. The Report contained Lamar's own personal commentary and conclusions, which Lamar honestly believed accurately reflected the situation at the City. Lamar, however, alleges her supervisors told to her to only publish the statistical numbers, which she claimed hid the City's discriminatory practices.

On January 19, 1995, Lamar received a Written Reprimand from Panoch for, inter alia: (1) failure to complete the 1995 Affirmative Action Report by the due date of December 2, 1994; and (2) failure to complete the Minority/Women's Business Enterprise Directory (hereinafter "MBE/WBE Directory") for the City Commission which was due December 22, 1994. Lamar later received a one-day suspension for failure to meet the January 31, 1995 deadlines for completing the 1995 Affirmative Action Report. Lamar did not appeal this disciplinary action to the City's autonomous Personnel (Civil Service) Board.

Lamar again failed to produce the 1995 Affirmative Action Report by the revised deadlines of March 1995. A five day suspension was recommended. Lamar appealed the recommendation, and the suspension was reduced to four days for records purposes only. Lamar did not further appeal this disciplinary action.

In February 1996, a City employee shot several co-workers and also committed suicide. The employee left a suicide note that allegedly stated his attack was to punish his former co-workers for the unfair and racist treatment that he

received. As a result of the shootings, the City hired Crisis Management International, Inc. ("CMI") to provide psychological services. During this time period, various meetings were held related to the shooting incident. Lamar was excluded from these meetings. At times, however, Lamar would invite herself to the crisis management meetings. Lamar was eventually told that it would be insubordination for her to speak to anyone without first directing her statements through Panoch and Larkin, her immediate supervisors.

On June 19, 1996, Lamar presented the 1996 Affirmative Action Report, which she had prepared, to the department head meeting. As with the 1995 Report, Lamar included her own commentary and conclusions in the Report which she honestly believed to be the truth. In particular, the "narrative section of this first draft plainly stated that 'we are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for the perceptions of unfairness and a proverbial silence about it all.' " Plaintiff's Opposition Brief [DE 159 at 4] (quoting Excerpt First Draft of 1996 Affirmative Action Report, Plaintiff's Appendix, Exhibit M [DE 68]). Lamar alleges that senior management was not receptive to the report and that each of the named individual defendants requested that she make various substantive changes to the report. Lamar refused to make the changes.

On July 22, 1996, Lamar left her own revised copy of the 1996 Report in the offices of Larkin and Panoch for review with the message that it was ready for printing and distribution. On July 26, 1996, Larkin met with Lamar and offered her the opportunity to resign. On July 29, 1996, Lamar distributed her own revised version of the 1996 Affirmative Action Report, without being reviewed, to City Manager Hanbury and all but one of the other department

heads. On July 29, 1996, Lamar also distributed the MBE/WBE Directory.

On August 5, 1996, Lamar responded to Larkin's request for her resignation, blaming the delay in producing the required reports on computer problems and also claiming that Larkin and Panoch were harassing her in an attempt to have her suppress her affirmative action analysis in her reports. On August 11, 1996, Lamar was notified of possible disciplinary action based, inter alia, upon the delinquent MBE/WBE Directory and the unauthorized distribution of the directory and revised 1996 Affirmative Action Report. The City Manager eventually approved Lamar's discipline which was to dismiss her effective October 21, 1996.

The crux of Lamar's complaint is that she was reprimanded, suspended and discharged allegedly due to her opinions and due to her race and gender. Lamar's principal argument is that her "attempt to publish her report was a substantial motivating factor in her discharge, as the timing of her discharge and immediate expulsion from the City showed that her superiors want to squelch her from communicating her opinions further." Opposition Brief [DE 159 at 5- 6].

III. DISCUSSION

The defendants have filed the present motions for summary judgment asserting the following arguments: (1) Lamar's speech was not protected by the First Amendment; (2) Lamar cannot establish a prima facie case of discrimination and cannot establish that the City's legitimate, non-discriminatory reasons for its actions were pretextual; and (3) the individual defendants are entitled to qualified immunity. The Court will address each of the defendant's arguments in turn.

A. *Summary Judgment Standard*

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265(1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325, 106 S.Ct. 2548.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for

trial." Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257, 106 S.Ct. 2505. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir.1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202.

B. *First Amendment Claim*

It is settled law that a state entity may not discharge a public employee in retaliation for speech protected under the First Amendment; however, a public employee's right to freedom of speech is not absolute. *Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir.1992); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989) (citations omitted); *see also Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir.1998), *reh'g denied*, 156 F.3d 188 (1998) (Table). To prevail because of a dismissal in retaliation for the exercise of free speech, pursuant to the test set forth by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and refined in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), a plaintiff must establish that (1) the expression addressed a matter of public concern; (2) the employee's First Amendment interests outweigh the interests of the employer in preserving the efficiency of government services; and (3) the employer's conduct was a substantial or motivating factor in the government's discharge decision.

Martinez, 971 F.2d at 712. The first two prongs are legal determinations for the court. *Id.; see also Martin*, 141 F.3d at 1420. Once the plaintiff establishes the first three prongs, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have reached the same decision to terminate the plaintiff's employment "even in the absence of the protected conduct." *Bryson*, 888 F.2d at 1566 (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Here, the Court finds that while Lamar has met the first prong, she has failed to establish the second prong.

1. *Lamar's expression did address matters of public concern*

In the present case, Lamar's alleged protected speech was her claim that the City was systemically discriminating against its minority and women employees. The Court notes that generally speech regarding discrimination addresses a matter of public concern. *See Connick*, 461 U.S. at 149 n. 8, 103 S.Ct. 1684 (1983). However, the Court's inquiry does not end here. This Circuit instructs that when an employee is speaking about discrimination regarding her own public employer, the Court must conduct further analysis as follows:

> First Amendment protection remains unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest...." [*Connick*, 461 U.S.] at 147, 103 S.Ct. at 1690. A court must therefore discern the purpose of the employee's speech--that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee. *Id.* at 146, 103 S.Ct. at 1690; *Kurtz*, 855 F.2d at 730; *Ferrara*, 781 F.2d at 1515-16. To accomplish this, a court considers

> "the content, form and context of a given statement, as revealed by the whole record." *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir.1991) (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690). A court may consider the employee's attempts to make the concerns public, [FN5] along with "the employee's motivation in speaking." Id. at 911 (citations omitted). While we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, " 'the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.' "

Kurtz, 855 F.2d at 727 (quoting *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir.1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987)). Rather, we must determine whether the purpose of Morgan's speech was to raise issues of public concern, on the one hand, or to further her own private interest, on the other. *See Deremo*, 939 F.2d at 912 (employees' request for compensation for remaining silent about sexual harassment did not constitute a matter of public concern); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987) (employee's private complaints of sexual harassment were not matter of public concern); *see also Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir.1993) (male co-worker's verbal support for victims of sexual harassment constituted speech touching upon a public concern). *Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir.1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994).

In the present case, the City argues that Lamar was acting as an employee, and therefore, her speech was not of a matter of public concern. Lamar responds that she was

acting as a citizen and not as an employee, and therefore, her speech was of a matter of public concern.

The allegations of protected activity relate to Lamar's attempt to be a part of the crisis management meetings and to publish the Affirmative Action Reports that she prepared. It is undisputed that the crisis management meetings were internal meetings within the City. It is also undisputed that Lamar prepared the Affirmative Action Reports as an employee of the City and not as a citizen. However, contrary to the City's arguments, Lamar's speech was not in furtherance of her own private interests. Rather, Lamar's concerns were of discrimination that affected others and certainly were intended principally to raise issues of public concern. The Court also notes that the cases cited by the City are all distinguishable because they involved cases where the plaintiffs were principally concerned with discrimination against themselves. Therefore, the Court finds that Lamar has met the first prong.

2. *City's interests in preserving the efficiency of government services outweighed Lamar's interests.*

In weighing the competing interests of Lamar and the City, several factors must be considered including: "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Martinez*, 971 F.2d at 712 (citing Bryson, 888 F.2d at 1567). In examining these facts, the Court must also take into account Lamar's position with the City and her job responsibilities.

[I]n weighing the State's interest in [disciplining] an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the

responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where ... an employee serves no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. *Id.* at 390-91, 107 S.Ct. at 2900. Conversely, when the employee serves in a sensitive capacity that requires extensive public contact, the employee's private speech may pose a substantial danger to the agency's successful functioning. *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237 (11th Cir.1992) (quoting *Rankin v. McPherson*, 483 U.S. 378, 390-391, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

In the present case, Lamar's position with the City was as its Affirmative Action Specialist, which involved coordinating and implementing the City's affirmative action/equal opportunity and workforce diversity programs. Lamar's position also required significant contact with the community. Lamar was certainly in a position to obtain knowledge about whether there was systemic discriminatory hiring and promotion practices in the City. Moreover, the Court notes that Lamar may very well be correct that the citizens of the City were entitled to know about her opinion that systemic discrimination was widespread within the City government. However, the manner in which she chose to make her views known was certainly disruptive.

As noted previously, the allegations of protected activity relate to Lamar's attempt to be a part of the crisis management meetings and to publish the Affirmative Action Reports that she prepared. It is undisputed that the crisis management meetings were internal meetings within the City. It is also undisputed that Lamar prepared the Affirmative Action Reports as an employee of the City and that the Reports were the City's formal documents.

Contrary to Lamar's assertions, the City did not believe that Lamar was entitled to have her own personal views contained in the City's own formal document. The Affirmative Action Report, while initially prepared by Lamar, was the City's report. Lamar's supervisors specifically requested that she make changes to the report. At that point, Lamar had two choices. First, she could make the changes against her will and seek an alternative means for espousing her own personal views. Alternatively, Lamar could refuse to make the changes and suffer the consequences, including charges of insubordination. It is undisputed that Lamar chose the latter, and consequently, it is undisputed that Lamar's actions constituted insubordination. *See, e.g., Hankard v. Town of Avon*, 126 F.3d 418, 422 (2d Cir.1997) ("Specifically, the First Amendment's shield does not extend to speech and conduct closely connected with insubordination 'that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace.' ") (citations omitted).

Returning to the factors listed above, while Lamar may have had entirely good intentions in refusing to make the changes to the Report, her good intentions do not negate the fact that her actions impeded the City's ability to perform its duties efficiently. The Court also notes that the manner, time and place of Lamar's alleged protected speech weigh against her. The Court finds that Lamar's complaints all involve her internal disagreements with her supervisors regarding the extent of the alleged discrimination within the City and how to deal with such alleged discrimination. The Court notes that "the purpose of the 'public concern' threshold test is to prevent the federal courts from becoming a 'roundtable for employee complaints over internal office affairs.' " *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988) (quoting *Connick*, 461 U.S. at 149, 103 S.Ct. 1684). Finally, the Court notes that the context within which Lamar's speech was made, within the City's own formal document, also weighs

against Lamar. While Lamar may have had a First Amendment right to make her opinions on racial discrimination known to the public, she was not entitled to do so in a report prepared for the City that would also represent the City's own position. Therefore, the Court holds that the City's interest in preserving the efficiency of its operations outweighed Lamar's First Amendment interests. *See also Hamm*, 708 F.2d at 653 (affirming district court's judgment against employee, whose job was to aid and assist her superior in resolving problems of discrimination "who persisted in 'going public' rather than first going through her supervisor, the person with the ultimate decision- making authority").[2]

C. *Discrimination Claims*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e- 2(a)(1). Discrimination is also unlawful under 42 U.S.C. § 1983, where the employer is also acting under color of state law. The Court notes that the elements of a Title VII claim and a section 1983 claim for discrimination are the same.[3]

A plaintiff may establish a prima facie case of discrimination either by "statistical proof of a pattern of discrimination," or "direct evidence of discrimination, which consists of 'evidence which, if believed, would prove the existence of discrimination without inference or presumption,' " or by "circumstantial evidence to prove discriminatory intent, using the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973)." *Holifield v. Reno*, 115 F.3d 1555, 1561-62 (11th Cir.1997) (citations omitted). In the usual case, direct evidence is not present

and the plaintiff must rely on circumstantial evidence. *Id.* at 1562.

Under the *McDonnell Douglas* framework, a plaintiff establishes a prima facie case of race discrimination under Title VII by showing: (1) the plaintiff belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees of other races more favorably; and (4) he was qualified to do the job. *Holifield*, 115 F.3d at 1562; *see also McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1310 (11th Cir.1998). "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." *Holifield*, 115 F.3d at 1562 (citations omitted).

If a prima facie case is shown, the defendant must "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." *Jones*, 137 F.3d at 1311. If this is done, then the plaintiff may attempt to show that the proffered reason was merely a pretext for the defendant's acts. Id. at 1311; *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Id.

Turning to the present action, the Court finds that there are genuine issues of material facts with respect to whether Lamar has established her prima facie case. However, the Court finds that there are no genuine issues of material facts as to whether the City's stated legitimate, nondiscriminatory reasons for its actions were pretextual. As discussed above, it is undisputed that Lamar was disciplined for refusing to follow her supervisors' instructions. Although the subject matter of the dispute

between Lamar and her supervisors involved race and gender discrimination, the City's actions with respect to Lamar herself were not due to her race or gender.[4] Rather, they were due to her insistence on including her own conclusions in the Affirmative Action Reports against her supervisors' wishes. *See, e.g., Hamm*, 708 F.2d at 653 (affirming district court's judgment against employee, whose job was to aid and assist her superior in resolving problems of discrimination "who persisted in 'going public' rather than first going through her supervisor, the person with the ultimate decision-making authority"). Therefore, the City is entitled to summary judgment as to Lamar's discrimination claims.

D. *Qualified Immunity*

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir.1997) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis: "First, the defendant government official must prove that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." *Evans*, 117 F.3d at 1320 (citing *Hartsfield v. Lemacks*, 50 F.3d 950, 953 (11th Cir.1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that reasonable officers would have understood that their actions violated his rights." *Evans*, 117 F.3d at 1320 (citing *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir.1995) and *Anderson v.*

Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ..., but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034 (internal citation omitted); *see also Moniz v. City of Fort Lauderdale*, 145 F.3d 1278 (11th Cir.1998).

Turning to the present case, it is clear that the individual defendants were acting within the scope of their employment. Further, the Court finds that the unlawfulness of the individual defendants' actions were not apparent as they were disciplining an employee for what they perceived to be insubordination.

Turning first to the First Amendment claims, the Court finds that even if genuine issues of material facts had existed as to whether the City is entitled to summary judgment, under the less stringent standard for qualified immunity, and under Lamar's version of the facts, it was not clear that the individual's actions were unlawful. While Lamar argues she was only a citizen speaking on a matter of public concern, she was also the Affirmative Action Specialist who was responsible for preparing an Affirmative Action Report for the City. Contrary to Lamar's assertions, it was not clearly established that her First Amendment interests outweighed the interests of the City in preserving the efficiency of government services. Lamar has not provided any cases which establish that the law was clear under similar facts to the present action that it would have been apparent to a reasonable person that the individual defendants' actions were unlawful. Therefore, based on the facts construed in the light most favorable to Lamar, the individual defendants are clearly entitled to qualified immunity. *See Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir.1998) (Because the first two prongs "involve legal

determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick test. Consequently, a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful."); see also Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237 (11th Cir.1992) ("This court also has recognized the difficult position of the public employer, which must decide whether to take disciplinary action without the aid of a bright-line standard to measure the constitutionality of its conduct. 'Because no bright line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful.' ") (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir.1989)).

Turning to Lamar's claims based on discrimination, the Court also finds that the law was not clearly established based on the facts presented that the individual defendants' actions were unlawful. The individual defendants were faced with a confusing situation where an employee was in charge of an area dealing with discrimination in the workplace. Clearly, the City and its employees were not entitled to treat Lamar differently based on her race or gender. However, it was unclear how to treat Lamar based on her opinions regarding discrimination. Here, it is undisputed that Lamar and her supervisors disagreed about whether there was any systemic discrimination within the City's government, and if so, the extent of such discrimination. Lamar's supervisors could reasonably believe that disciplining her for disregarding her supervisors' order to change portions of the City's Affirmative Action Report was not clearly a violation of the law. Thus, the Court finds that

it was not apparent that the individual defendants' actions were unlawful, and therefore, the individual defendants are entitled to qualified immunity in their individual capacities.. *See, e.g., Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. Unit B.1980) (finding plaintiff who formerly handled employer's discrimination complaints failed to establish Title VII claim).

IV. CONCLUSION

Lamar has brought the present action against the defendants asserting she was discriminated against because of her race and gender and that she was retaliated against because of her protected speech. The Court notes that it is undisputed that Lamar and her supervisors disagreed about the extent of any systemic discrimination within the City. It is also undisputed that Lamar refused to make changes to the City's Affirmative Action Report, which were requested by her supervisors, and that she distributed the Report without her supervisors' review. Lamar's employment was then terminated. While Lamar may have been entitled as a citizen to express her opinions regarding what she honestly perceived as systemic discrimination in the hiring and promotion practices of the City with respect to its employees, she was not entitled to express such opinions, over her supervisor's objections, in the City's own formal document. Therefore, the Court holds that the City's termination of Lamar's employment, and the other adverse treatment Lamar received, was not based upon her protected speech or her race or gender, but rather was based upon disagreements between Lamar and her supervisors and her own insubordination.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant John Panoch's Motion for Summary Judgment [DE 135] is hereby **GRANTED;**

2. Defendant Bruce Larkin's Motion for Summary Judgment [DE 137] is hereby **GRANTED;**

3. Defendant Pete Witschen's Motion for Summary Judgment [DE 139] is hereby **GRANTED;**

4. Defendant George Hanbury's Motion for Summary Judgment [DE 141] is hereby **GRANTED;**

5. The Defendant City of Fort Lauderdale's Motion for Summary Judgment [DE 143] is hereby **GRANTED;**

6. Final Summary Judgment is hereby entered in favor of the defendants, City of Fort Lauderdale, John Panoch, Bruce Larkin, Pete Witschen, and George Hanbury, and against the plaintiff, Deborah Rice-Lamar, and the plaintiff shall take nothing from this action;

7. All pending motions are hereby **DENIED** as moot; and

8. This case is closed.

DONE AND ORDERED.

FOOTNOTES TO OPINION

FN1. The Court has taken the material facts from the Plaintiff's own version of the facts contained in her opposition briefs and from the undisputed facts contained in the Joint Pretrial Stipulation.

FN2. Lamar relies heavily on the case *Cromer v. Brown*, 88 F.3d 1315 (4th Cir.1996), wherein the plaintiff, an African-American and former deputy sheriff, brought an action against the sheriff's office and the sheriff himself. Cromer asserted claims of racial discrimination and retaliation for exercising his first amendment rights after he was allegedly

discharged for endorsing a letter written by the black officer's association and sent to the sheriff raising specific charges of racial discrimination. However, the *Cromer* case is clearly distinguishable from the present case, because here, unlike *Cromer*, Lamar seeks to express her views in her employer's own document being sent to others as opposed to a document being sent from others to her employer, the City.

FN3. The Eleventh Circuit has held that Section 1983 may be used as a parallel remedy for gender or race discrimination which violates the equal protection clause of the Fourteenth Amendment. The elements of such a claim are the same as the elements of a Title VII action. *Cross v. State of Alabama*, 49 F.3d 1490, 1507-08 (11th Cir.1995) (citing *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n. 16 (11th Cir.1982)). Moreover, the Court's analysis applies equally to Lamar's claims under 42 U.S.C. § 1981, *see Peterson v. BMI Refractories*, 132 F.3d 1405, 1412 n. 13 (11th Cir.1998) (noting that this Circuit has held that the elements of a disparate treatment claim under section 1981 and Title VII are identical) and 42 U.S.C. § 1985(3). *See Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (noting section 1985(3) narrow discriminatory intent element imposes a significant hurdle for plaintiffs).

FN4. Lamar discusses numerous instances where the City allegedly discriminated against other employees. While these other employees may have an action against the City, these instances do not support the allegations that the City discriminated against Lamar because of her race or gender.

(2)

JUN 13

No. 00-1709

IN THE

Supreme Court of the United States

DEBORAH RICE-LAMAR,

Petitioner,

v.

CITY OF FORT LAUDERDALE, a municipality, and GEORGE HANBURY, PETE WITSCHEN, BRUCE LARKIN, and JOHN PANOCH, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THE GROUNDS THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED WHEN SHE WAS DISMISSED FOR ADMITTEDLY REFUSING TO COMPLY WITH HER SUPERVISORS' DIRECTIVES TO DELETE HER PERSONAL OPINIONS AND COMMENTARY FROM AN OFFICIAL CITY AFFIRMATIVE ACTION REPORT.

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RESTATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.3 and 24.2, Respondents state that they are not satisfied with the Petitioner's Statement of the Case ("Statement") included in her Petition for Writ of Certiorari ("Petition"). Petitioner's Statement contains argument, conclusory allegations which were not in the record, and alleged facts which are immaterial and insufficient to avoid summary judgment. Further, Petitioner's Statement contains misstatements of record evidence and testimony. Respondents therefore adopt and incorporate by reference herein the facts set forth in the Opinions of the United States Eleventh Circuit Court of Appeals (Appendix A to the Petition, pp. 1a-17a) and the United States District Court for the Southern District of Florida (Appendix B to the Petition, pp. 18a-35a) as a more complete, precise, and accurate statement of the case than that offered by Petitioner. A summary of the material facts and procedural history in this case is set forth below.

A. Summary Of Pertinent Record Facts.

Petitioner, Deborah Lamar ("Lamar"), is an African American female who was employed by the City of Fort Lauderdale, Florida, as its Affirmative Action Specialist from June 20, 1988, through her dismissal on October 21, 1996. In that division level management position, she was responsible for planning, directing, and implementing a variety of internal equal employment opportunity and affirmative action programs, and preparing annual affirmative action reports (annual summaries of the progress being made towards the goals established in the City's Affirmative Action Plan). Lamar's immediate supervisor was City Personnel Manager, John Panoch. Panoch reported to

the Director of Administrative Services, Bruce Larkin, who reported to the Assistant City Manager, Pete Witschen, and, ultimately, the City Manager, George Hanbury. All of Lamar's work was subject to review by Panoch and Larkin, and all communications outside the Personnel Department were to go through Panoch and/or Larkin first.

On February 1, 1994, Panoch gave Lamar a deadline of April 29, 1994 to complete the statistical analysis for the City's 1994 Affirmative Action Report. Lamar did not meet that deadline. Instead, subsequent to the date it was due, Lamar finally turned in her draft of the 1994 Affirmative Action Report which contained statistics, analysis, and a narrative section expressing her view that the City should take steps to address the high percentage of juvenile crime within the City, arguing that because these juveniles were the future work force, failure to act would affect the City because minority candidates for police officer positions would not be able to pass the background investigation. Both Larkin and Panoch responded that they did not believe this was an issue to be addressed by Administrative Services or Personnel but rather, the City's Police Department and the educational system. Panoch and Larkin determined that only the statistics and methodology were necessary for purposes of the Affirmative Action Report, and therefore asked Lamar to revise the report accordingly. Lamar was given a new completion date of December 2, 1994; however, she failed to meet that deadline.

On January 19, 1995, Lamar received a written reprimand from Panoch, for, inter alia: (1) failing to complete the 1994 Affirmative Action Report by the revised due date of December 2, 1994; and (2) failing to complete the Minority/Women's Business Enterprise Directory

(hereinafter "MBE/WBE Directory") which was due December 22, 1994. Lamar was then given until January 31, 1995 to complete both projects. Lamar did not meet this subsequent deadline and received a one-day suspension (for records purposes only).

Because the 1994 Affirmative Action Report was never completed, Lamar was directed to prepare a 1995 report instead. Subsequently, she submitted her draft of the City's 1995 Affirmative Action Report, which contained a philosophical narrative discussion regarding the direction Lamar believed affirmative action should take in the next century; the report itself contained very few numbers. Panoch instructed Lamar to delete the personal commentary and to provide only statistics in the report.

On March 24, 1995, Lamar forwarded her final draft of the 1995 Report to Panoch, which still contained her personal commentary. This version was never sent to the City Commission. Instead, using the numbers provided by Lamar, Panoch prepared his own version of the 1995 Report which omitted Lamar's personal narrative. The new version was provided to the City Commission on April 5, 1995. Lamar disagreed with the omission of her opinions and commentary, but ultimately elected to sign the report. Because Lamar had failed to timely produce the 1995 Affirmative Action Report as directed by the revised deadline of March 1995, Lamar received a five day suspension, which was reduced by Larkin in the City's grievance process to a four day suspension for records purposes only.

In February 1996, Clifton McCree, a mentally deranged former City employee, murdered five City workers, seriously wounded another, and then committed suicide. Although she had never even met McCree, Lamar was of the opinion that

his homicidal outburst was caused by racism. In the aftermath of the McCree tragedy, the City hired Crisis Management International, Inc. ("CMI") to provide psychological services to its employees. During this time period, various meetings were held related to the City's response to the shooting incident. While Lamar was generally excluded from the crisis management meetings, she would, at times, invite herself to those meetings. Lamar was eventually told that it would be insubordination for her to speak to anyone at CMI without first directing her statements through her immediate supervisors.

On June 19, 1996, Lamar presented her proposed draft of the City's 1996 Affirmative Action Report at a City department head meeting. As with the 1995 Affirmative Action Report, Lamar included her own personal commentary and conclusions in the report. In particular, the narrative section of this draft included Lamar's personal commentary that "we are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for the perceptions of unfairness and a proverbial silence about it all." Lamar perceived that senior management was not receptive to her proposed report because each of the named individual defendants expressed reservations about its content and requested that she make changes to the report. Specifically, Lamar was directed to remove her personal commentary and opinions and to instead draft a report that focused on the statistical data collected on minority and female representation in the City's workforce. Lamar refused to make the changes.

On July 22, 1996, Lamar left a revised copy of her proposed 1996 Affirmative Action Report in the offices of Panoch and Larkin, with the message that it was ready for

printing and distribution. The revised draft still contained most of the personal commentary Lamar had been directed to omit. On July 26, 1996, Larkin met with Lamar and offered her the opportunity to resign. On July 29, 1996, without ever having it reviewed and approved by Panoch or Larkin, Lamar distributed her version of the 1996 Affirmative Action Report to City Manager Hanbury and all but one of the other department heads. Lamar also distributed her unreviewed and unapproved draft of the MBE/WBE Directory (which was originally due December 22, 1994) on July 29, 1996.

On August 5, 1996, Lamar responded in writing to Larkin's request for her resignation. She refused to resign and attempted to blame the delay in producing the required reports on computer problems. She also asserted that Larkin and Panoch were harassing her in an attempt to have her suppress her affirmative action analysis in her reports. On August 11, 1996, Lamar was notified of possible disciplinary action for incompetent performance based, inter alia, upon the unauthorized distribution of her version of the City's 1996 Affirmative Action Report (without the revisions directed by her supervisors) and her repeated failure to meet work assignment deadlines. The City Manager ultimately approved Lamar's dismissal effective October 21, 1996.

B. Summary Of Procedural History.

On August 19, 1997, Lamar filed suit against the City and her supervisors, individually, asserting that she had been discriminated against on account of her race and gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Fourteenth Amendment to the United States Constitution (brought through 42 U.S.C. § 1983). Lamar further asserted that Respondents

discriminated against her on account of her race in violation of 42 U.S.C. § 1981 (via Section 1983). In addition, Lamar asserted a claim under the First Amendment (via Section 1983), alleging that she was retaliated against because of alleged protected speech. Finally, Lamar asserted a conspiracy claim under 42 U.S.C. § 1985(3).

In response to Lamar's allegations, and throughout this litigation (including summary judgment), Respondents maintained that Lamar was dismissed due to her persistent performance deficiencies, including, inter alia, her *admitted* refusal to comply with her supervisors' instructions, repeated failure to meet deadlines for completing work assignments, and unauthorized distribution of her version of the City's 1996 Affirmative Action Report.

By order dated November 25, 1998, the district court entered summary judgment in favor of Respondents on all counts, noting that in so doing, it had "taken the material facts from [Lamar's] own version of the facts contained in her opposition briefs and from the undisputed facts contained in the Joint Pretrial Stipulation." *See* Petition, p. 36a n.1. As to the First Amendment claim, the district court held that, while Lamar's expression did address matters of public concern (which Lamar honestly believed to be the truth), the City's interests in preserving the efficiency of government services outweighed Lamar's interests. Specifically, the district court ruled that "[w]hile Lamar may have had a First Amendment right to make her opinions on racial discrimination known to the public, she was not entitled to do so in a report prepared for the City that would also represent the City's own position," concluding that "the manner in which [Lamar] chose to make her views known was certainly disruptive." *See* Petition, pp. 28a, 30a. The district court reasoned that:

> The Affirmative Action Report, while initially prepared by Lamar, was the City's report. Lamar's supervisors specifically requested that she make changes to the report. At that point, Lamar had two choices. First, she could make the changes against her will and seek alternative means for espousing her own personal views. Alternatively, Lamar could refuse to make the changes and suffer the consequences, including charges of insubordination. It is undisputed that Lamar chose the latter, and consequently, it is undisputed that Lamar's actions constituted insubordination.

See Petition, p. 29a (citing *Hankard v. Town of Avon*, 126 F.3d 418, 422 (2d Cir. 1997)).

Lamar's subsequent Motion to Alter or Amend Judgment, was denied by the district court on July 30, 1999. In that order, the district court stated:

> [w]hat Lamar still fails to recognize is that the Affirmative Action Reports were the City's own reports, and not Lamar's, and the City had a right to not publish Lamar's own views in the reports. Even if Lamar had been correct as to her opinions regarding discrimination at the City, the persons ultimately responsible for the content of these reports (not Lamar), had the ultimate right to decide what to include, and not include, in these reports. The problem with Lamar's argument is not with the content of her opinions, but the manner in which Lamar chose to express those opinions. Lamar certainly could have expressed

her views using alternative channels; however, she chose to insist that her disputed views remain in the Affirmative Action Report.

In her complaint (and two subsequent amended complaints), Lamar never asserted a claim for retaliation under Title VII. Instead, on February 1, 1999, more than two months after the district court's order granting summary judgment and several months after the deadline for amending the pleadings, Lamar for the first time sought leave to amend to assert a Title VII retaliation claim. By order dated July 30, 1999, the district court denied Lamar's motion as untimely and further found that amendment would be futile in that Lamar's admitted failure to comply with the directives of her superiors was a legitimate, non-pretextual reason for the City's decision to terminate her employment. The district court's denial of Lamar's motion to amend was not even mentioned in the instant Petition and has not been challenged before this Court as a basis for invoking certiorari review.

Lamar filed her Notice of Appeal on August 12, 1999. On appeal, the Eleventh Circuit assumed without deciding that Lamar's expression constituted speech on a matter of public concern. The court noted, however, that "[o]ur notice of the fact that the Affirmative Action Report may not be accurately characterized as *Rice-Lamar's speech (as opposed to the City's* speech*)* heightens our doubt that the speech at issue should receive any First Amendment protection." *See* Petition, p. 16a n.10 (emphasis in original). The Eleventh Circuit went on to affirm the district court's order, holding that "[b]ecause Rice-Lamar refused to alter the report in accordance with her superiors' instructions, any First Amendment interest she may have had in publishing her views is outweighed by the City's interest in producing an

official document that conformed to the City's expectations." *See* Petition, p. 9a. The court therefore concluded that Lamar was lawfully dismissed, reasoning that she was given a direct order to amend the Affirmative Action Report to delete her "dramatic personal commentary," that she flatly refused to perform that lawful task (which was within the scope of her duties), and that " '[s]uch refusal to abide by a valid order is closely connected with, and can be classified as insubordination.' " *See* Petition, pp. 2a, 9a. Lamar's subsequent Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 12, 2001.

C. Additional Misstatements In The Petition For Writ Of Certiorari.

Pursuant to Supreme Court Rule 15, which places an affirmative duty upon Respondents to "address any perceived misstatements of fact or law set forth in the petition that bears on what issues properly would be before the Court if certiorari were granted," Respondents point out the following additional misstatements set forth in the Petition:

Beginning with the last paragraph on page 8 of the Petition and concluding with the end of the statement of facts on page 9 (and reasserted at the end of page 24 through the end of page 25), Lamar has included matters that were not in the record before either the district court or the Eleventh Circuit. Indeed, many of the alleged facts recited therein occurred, if at all, long after Lamar's dismissal and therefore have no relevance whatsoever to the determination of whether certiorari should be granted in this case. It is noteworthy that Lamar's attempt to influence the Eleventh Circuit Court of Appeal with such irrelevant and inflammatory allegations led the appellate court to strike the last section of Lamar's

petition for rehearing. Similarly, this Court should strike or otherwise disregard such impertinent and improper surplusage.

On page 6 of her Petition, Lamar states that she "nevertheless complied with her superiors' directives and altered the [1995] report." Further, on page 24, Lamar states "[t]he City Managers, in an attempt to add legitimacy to the [1995] report that was eventually submitted to the City Commissioners, stated falsely that the statistics [in the 1995 Report] were prepared by Lamar." These statements, however, are flatly contradicted by the record evidence developed in the district court. Specifically, the record as to the 1995 Affirmative Action Report established that Lamar prepared the statistical information for that report and that, when she refused to delete her personal philosophical narrative, her supervisor used Lamar's statistics to prepare a separate report for distribution to senior management and the City Commission. Although Lamar disagreed with the deletion of her narrative portion from the 1995 Report, she nevertheless elected to sign that report.

Throughout her Petition, Lamar states her opinion that the reports "did not reveal the extent of the City's discrimination" and implies that City officials were attempting to "cover up" unlawful employment practices. The undisputed record facts establish, however, that Lamar's superiors merely directed Lamar to prepare a statistical report (as opposed to a narrative report) -- in essence, a snapshot of where the City was with respect to its affirmative action goals; and that those statistics, as developed by Lamar, were accurately stated in the final reports. Other than Lamar's personal opinion, no evidence was presented below to establish that the statistics were "distorted" in any manner. *See* Petition, p. 7.

Based upon an e-mail discussion, Lamar accuses Panoch and Larkin of attempting to "gag" her after she voiced her view that racism was a cause of the McCree tragedy. This is a blatant misstatement of the record. The undisputed evidence shows that the "gag" e-mail exchange was prompted when Lamar went to Assistant City Manager Witschen directly on March 29, 1996 to seek approval for her attendance at a seminar. Witschen knew nothing about the request and expressed his annoyance to Larkin regarding Lamar's attempt to bypass her supervisors. In response, Larkin and Panoch reiterated to Lamar the chain-of-command policy and directed that, except in certain specified instances, all communications with senior management were to first go through Panoch and Larkin. This corporate communication policy had been a part of Lamar's work plan since at least 1992, and everyone in Administrative Services was subject to the same policy.

On page 7 of her Petition, Lamar states that she proposed to include a reference to a Police Department incident in her draft of the City's 1996 Affirmative Action Report. Lamar has failed to disclose that the record evidence below established that the incident involved a City Police Officer who attended an allegedly racist function in another state during off duty hours and, as a result, was terminated from City employment.

Finally, throughout her Petition, Lamar refers to the Affirmative Action Reports as *her* reports. As established by the undisputed record facts and recognized by the district court and the Eleventh Circuit, however, those reports were official City reports that were prepared on behalf of the City, not Lamar, and which represented the City's position, not Lamar's. Specifically, the Eleventh Circuit ruled that:

> Contrary to Rice-Lamar's perception, her job with the City did not involve utilizing the City's resources to crusade for her personal vision of social justice; her job was to follow her supervisors' lawful instructions . . .
>
> * * *
>
> Civil servants cannot cry foul when they attempt to use their government employers as stage dummies, and are then disciplined for it.

See Petition, pp. 9a-10a

REASONS FOR DENYING THE WRIT

A. The Petition For Writ Of Certiorari Should Be Denied Because The Sixth Circuit's Decision In *Johnson v. Univ. of Cincinnati* Is Factually Distinguishable. Hence, No Conflict Exists That Would Warrant Certiorari Review.

Lamar first argues that certiorari should be granted because the Eleventh Circuit's opinion is allegedly "diametrically opposite" to the Sixth Circuit's opinion in *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir.), *cert. denied*, 121 S. Ct. 657 (2000). Lamar asserts that *Johnson* is "virtually 'on all fours' with the instant case," as to her issue of whether "an Affirmative Action/EEO Officer can report discrimination to their (sic) superiors without fear of repercussion." *Johnson* is readily distinguishable from the case sub judice and, therefore, no conflict sufficient to warrant certiorari review exists.

In *Johnson*, the plaintiff was a senior management official in charge of the university's affirmative action program who reported directly to the university's president. He distributed a memorandum in 1994 to the university's cabinet questioning the university's commitment to equal employment opportunities. Subsequently, in 1995, he sent another memorandum, this time to another senior management official, again questioning the university's commitment to equal employment opportunities. During this time period, he was never advised of any performance deficiencies.

In December 1995, the plaintiff filed a charge of race discrimination and retaliation under Title VII with the EEOC, alleging, inter alia, that he was being prevented from fully participating in human resource matters in retaliation for objecting to what he perceived to be discriminatory hiring practices. One month later, the plaintiff was notified for the first time of certain performance deficiencies. When he subsequently disputed the criticisms of his work performance, he was fired. 215 F.3d at 568-70. The plaintiff thereafter filed suit for race and national origin discrimination in violation of 42 U.S.C. § 1981 and Title VII, retaliation in violation of Title VII, and violation of his free speech rights under the First Amendment, brought via 42 U.S.C. § 1983. *Id.* at 566.

The court in *Johnson* first held that the plaintiff stated a claim under Section 1981 and Title VII for race discrimination based upon his advocacy on behalf of women and minorities and further held that the plaintiff's advocacy for nondiscriminatory hiring practices was protected conduct under Title VII's anti-retaliation provision. The court then concluded that, because the plaintiff had presented evidence that his job performance was criticized immediately after his

filing of the EEOC charge and that he was shortly thereafter terminated, he had presented a factual issue for the jury as to pretext and, hence, summary judgment for defendants had been improvidently granted. *Id.* at 581-83. As to the First Amendment claim, the court held that the university's "proclaimed need to run an efficient organization" did not outweigh the plaintiff's right to speak. The court reasoned that the plaintiff's speech advanced the university's affirmative action goals instead of undermining those goals. *Id.* at 585.

A number of critical facts readily distinguish *Johnson* from the case sub judice. First, *Johnson* did not hold (as Lamar is essentially arguing here) that affirmative action/ EEO officers have an unfettered right to speak out in any manner they see fit -- including incorporating their own opinions and "dramatic personal commentary" into their employer's official reports. Indeed, in the instant case, the crux of Lamar's complaint is that her "attempt to publish *her* report was a substantial motivating factor in her discharge, as the timing of her discharge and immediate expulsion from the City showed that her superiors want to squelch her from communicating her opinions further." *See* Petition, p. 22a (emphasis added). As the record evidence established and the lower courts found, however, unlike the plaintiff in *Johnson*, Lamar did not try to "speak out" through personal memoranda to other division heads or City management. Instead, she insisted upon exerting complete editorial control over the content of an official City document. As the district court stated, "[w]hile Lamar may have had a First Amendment right to make her opinions on racial discrimination known to the public, she was not entitled to do so in a report prepared for the City that would also represent the City's own position." *See* Petition, p. 30a.

Indeed, in comparing herself to the plaintiff in *Johnson*, Lamar has missed the critical distinction: the report being prepared here was the *City's* report -- not *her* report. Thus, the City had "a significant interest in regulating the speech to make certain it was presented in the most informative and helpful manner." *Johnson*, 215 F.3d at 588 (Kennedy, J., dissenting). To the contrary, the *Johnson* plaintiff prepared his own internal memorandum; he did not try to include his "dramatic personal commentary" in an official university document.[1]

Second, unlike the instant case, *Johnson* did not involve blatant, repeated failures to meet deadlines and comply with senior management directives. Here, the record facts establish that Lamar was directed by her superiors to prepare a specific report on their (i.e., the City's) behalf, subject to their review, by a specific date and in a specific format. Lamar *repeatedly* failed to meet the established deadlines and refused to modify the content of the report as directed. As a result, she received progressive discipline over a period of approximately eighteen (18) months until she was ultimately dismissed from City employment. Thus, this is not a case like *Johnson* where the employee filed an EEOC charge and then, out of the blue, his performance was criticized with no prior warning and he was terminated within a month.

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1. Further, because the document Lamar sought to publish in direct defiance of her superiors' directives was an official City document for which Lamar's superiors had ultimate responsibility, those superiors could lawfully direct her to omit her unsubstantiated opinions and conclusions from the City's Affirmative Action Report. As this Court has previously noted, reasonable restrictions on the manner, time and place of protected speech do not violate the Constitution. *See Connick v. Myers*, 461 U.S. 138, 152 (1983); *Waters v. Churchill*, 511 U.S. 661, 698 (1994) (Stevens, J., dissenting).

Finally, throughout this case, Lamar maintained that she was discriminated against in violation of Title VII and Section 1981 because of *her* race and *her* gender -- not for alleged advocacy on behalf of other minority employees. Lamar's untimely and futile attempt to assert a Title VII retaliation claim after summary judgment had already been entered against her was apparently an afterthought. Accordingly, the Eleventh Circuit's decision in this case does not conflict with *Johnson* because Lamar's case was based upon significantly different facts. The Petition should therefore be summarily denied.

B. The Petition For Writ Of Certiorari Should Be Denied Because The Eleventh Circuit's Decision Does Not Abrogate Title VII Rights.

Lamar next argues that the Eleventh Circuit's decision, "in abrogation of Title VII, forecloses any opposition to discrimination by a management employee with affirmative action responsibilities." *See* Petition, p. 17. Lamar's argument in this regard is disingenuous because this simply is not and was not ever a Title VII retaliation case. The Eleventh Circuit's holding as to Lamar's speech was predicated solely on First Amendment grounds. Indeed, Lamar did not assert in either her original or amended complaints in the district court any claim for retaliation under Title VII based upon her speech and/or advocacy on behalf of minorities. Rather, Lamar's Title VII claims were premised solely upon alleged discrimination on account of *her own* race and gender. Although Lamar belatedly sought to amend her complaint a third time to add a Title VII retaliation claim after summary judgment had already been entered against her, the request was denied as untimely and futile. Petitioner does not assert denial of her motion to amend as error meriting certiorari

review. Nor does Petitioner assert rejection of her race and gender bias claims as a basis for seeking review by this Court.

Further, the Eleventh Circuit's opinion did not "foreclose" Lamar's First Amendment rights by any stretch of the imagination. Instead, the Eleventh Circuit correctly held that the City had a legitimate right to control the content of its own official documents and concluded that Lamar was terminated not for what she said, but rather, for disobeying the lawful directives of her superiors. Nothing in that opinion would prevent Lamar from sending memoranda to her superiors stating her concerns or making recommendations, through the chain-of-command, for suggested improvements. Lamar, speaking as a citizen, could have addressed her concerns privately with the City Commissioners, albeit after complying with the City's chain-of-command (corporate communication) policy. *See* Petition, p. 10a

Finally, contrary to Lamar's argument, the Eleventh Circuit's opinion herein can be easily reconciled with the prior appellate decisions in *Hamm v. Members of Bd. of Regents*, 708 F.2d 647 (11th Cir. 1983), and *Whatley v. Metro Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980). In *Hamm*, a retaliation case brought under Title VII and the First Amendment, an EEO specialist was terminated after, inter alia, "going public" to the campus newspaper with an internal investigative report without prior approval of her superiors. The Eleventh Circuit upheld the termination, reasoning that:

> [the plaintiff's] role was to aid and assist her superior, the vice president for administration, in resolving problems of discrimination facing [the

> employer's] non-academic personnel. Although she may have been an adviser, expediter, or go-between, the record is clear that she had no ultimate decision-making authority. That authority, and the concomitant responsibility, was vested in her supervisor. The record demonstrates that, despite repeated admonitions as to the procedures her supervisors wished her to follow in resolving discrimination complaints, the plaintiff persisted in "going public" rather than first going through her supervisor, the person with the ultimate decision-making authority. The university placed the plaintiff in a position which required loyalty to her supervisor and expected her to perform her assigned duties within the framework established by the university.

708 F.2d at 653. The Eleventh Circuit thus concluded that where an employee chooses to "work outside the framework" established by the employer for the position, the employer may legally "remove [the] employee . . . based on the manner in which the employee undertakes his or her duties." *Id.* at 654.

In *Whatley*, a Title VII retaliation case, the plaintiff served as the Director of Compliance in the defendant's EEO office. In that position, the plaintiff was subordinate to and was required to report to the Assistant General Manager for EEO matters. 632 F.2d at 1326. During the course of his employment with the defendant, the plaintiff violated normal reporting procedures and began to assume duties beyond his job description. On a number of occasions, and despite having been repeatedly advised of the proper reporting procedures, the plaintiff, without his supervisor's consent or knowledge,

made derogatory remarks about the employer's EEO affairs and the EEO office to persons outside the office, including the press. Subsequently, the plaintiff failed to follow internal procedures regarding the reporting and investigation of employee grievances and, as a result, he was terminated. *Id.* at 1327. The Fifth Circuit upheld the termination, finding that the employee had failed to follow prescribed administrative procedures, noting that "it was not the fact that appellant filed a complaint for [another employee] but the manner in which he did so." The court in *Whatley* reasoned that, in addition to his refusal to follow instructions from his supervisor, the plaintiff's "[failure] to follow prescribed administrative procedures is not a statutorily protected activity. Title VII cannot be held to immunize an employee from all consequences of his behavior merely because part of his job happens to require the handling of discrimination complaints." *Id.* at 1329.

Thus, in both *Hamm* and *Whatley*, the Circuit Courts of Appeal upheld the terminations of employees with EEO duties after finding that (like Lamar) they were not terminated for what they said, but rather, how they said it -- specifically, in each instance, the employees (like Lamar) failed to follow corporate communication policies and/or management directives. "This, of course, is the unpardonable corporate sin, not going through channels." *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 753 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

C. The Petition For Writ Of Certiorari Should Be Denied Because The Eleventh Circuit Decision Does Not Contravene Public Policy.

As a final basis for certiorari review, Lamar argues that "the Eleventh Circuit has concluded that a public manager who has a duty to report on EEO/AA violations and advise management on potential EEO liabilities, such as Lamar, can be fired for insubordination for reporting violations of law." This argument, however, misstates the Eleventh Circuit's holding in that Lamar was fired not for the content of her speech, but rather for the manner, time and place in which she chose to speak.

Although it is well established that a public employer may not retaliate against an employee for speech protected by the First Amendment, the employee's right to free speech is not absolute -- rather, the employee's interest in speaking out must be balanced against the government's legitimate interest in efficient public service. *See Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). A governmental body -- as an employer -- enjoys a legitimate interest in promoting efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service. *Connick*, 461 U.S. at 150-151. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The public employer need not allow "events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 151-52.

Further, the First Amendment only "assures public employees that they may express their views on issues of public concern without fear of discipline or termination *as long as they do so in an appropriate manner and at an appropriate time and place.*" *Waters*, 511 U.S. at 698 (Stevens, J., dissenting) (emphasis added). "When a government employee personally confronts his immediate supervisor, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Connick*, 461 U.S. at 152.

In *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986), a Title VII retaliation case, a manager in charge of the employer's affirmative action program began acting as a compliance officer -- a self-imposed duty that fell outside her job description and was not authorized by her superiors. The appellate court upheld the dismissal of the manager, concluding that "[a]n employee does not receive special protection . . . simply because the employee handles discrimination complaints or works on affirmative action matters." The court in *Holden* reasoned that the employer "was entitled to decide the manner in which the company would implement its affirmative action programs. [It] was not required to accept plaintiff's position that her job included compliance work as well as writing and amending affirmative action plans." *Id.* at 753. *See also Lewis v. Cowen*, 165 F.3d 154, 163 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999) (finding no First Amendment violation for the termination of a state lottery director who disregarded a direct order of his superior regarding a matter that was of public concern, reasoning that the employee had engaged in "a sustained refusal to follow the professional direction of a supervisor in a critical matter.").

In this case, Lamar is, in essence, seeking a ruling from this Court that the First Amendment vests public employees with EEO duties with complete autonomy in determining the content of their employer's official documents and reports. She also argues that such employees are immune under the First Amendment from disciplinary action or dismissal when they deliberately deviate from the employer's policies. As shown above, this is not the law. Indeed, an employee who, like Lamar, "violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals," should not be protected for such conduct simply because he or she is charged with monitoring the employer's affirmative action program. *See Holden*, 793 F.2d at 753.

CONCLUSION

The undisputed material facts below established that Lamar was dismissed from City employment not for what she said, but rather, for admittedly refusing to comply with the clear and lawful directives of her superiors to delete her "dramatic personal commentary" from an official City report. She also continually failed to meet deadlines for work assignments and, after being offered the opportunity to resign, distributed her own version of the City's 1996 Affirmative Action without her supervisors' prior review or approval. Lamar's performance deficiencies continued in spite of progressive discipline and, thus, her employment was properly terminated. These facts clearly compel the conclusion reached by the Eleventh Circuit and distinguish this case from *Johnson*. Further, the Eleventh Circuit has not foreclosed alternative avenues for public employees like Lamar to express their opinions on important public matters.

Instead, it has merely held that such public employees cannot ignore reasonable work rules and lawful management directives in trying to accomplish their personal goals and that the First Amendment does not confer any right to express personal opinions, over management objections, in a public employer's own official reports. Accordingly, the Petition for Writ of Certiorari should be summarily denied.

Respectfully submitted,

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